In the Supreme Court

OF THE

United States

OCTOBER TERM, 1945

No. 835

JOHN E. GALLOIS, Executor, and JEANNE G. HILL, Executrix, of the Estate of Margaret P. Gallois, Deceased,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

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to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

May it please the Court: The Petitioners, John E. Gallois, executor, and Jeanne G. Hill, executrix, of

the Estate of Margaret P. Gallois, Deceased, respectfully petition this Honorable Court for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Margaret P. Gallois, hereinafter called the decedent, was born March 17, 1856, and died testate on August 8, 1940, a resident of the City and County of San Francisco, California. The petitioners, John E. Gallois and Jeanne G. Hill, are the duly qualified and acting executor and executrix, respectively, of her last will and testament. The estate tax return was filed with the Collector of Internal Revenue for the First District of California. (Tr. 90.)

Prior to August, 1924, the decedent had loaned to her son, John E. Gallois, the sum of $251,000.00 with no evidence of the indebtedness being executed in writing. In order to make this loan she had heavily encumbered her own property. Because she had advanced to her son such a large part of his portion of the estate, the decedent desired to protect the interest of her other child, Jeanne G. Hill. Therefore, on August 9, 1924, she executed a trust, naming herself, Emile M. Pissis, and William H. Cook as trustees. (Tr. 90.)

The trustees were directed to apply the income of the trust, (a) to the payment of interest due or to become due on the obligations of the decedent, secured

by liens on the trust property; (b) to the payment of taxes, assessments, insurance, repairs, etc.; and (c) after payment of the above charges, to pay the remainder of the net income to the decedent. (Tr. 90.)

Other material provisions of the trust are as follows:

Second. The trustees are likewise authorized and directed to apply to the maintenance and support of said Margaret P. Gallois any portion of the principal of said trust fund which may at any time be in their opinion necessary for her maintenance and support by reason of or in the event of any deficiency in the income of said trust fund. (Tr. 91.)

Third. Upon the death of said Margaret P. Gallois the said trust and the powers and duties of the surviving trustees shall continue during the life of Jeanne G. Hill, and during her life the net income from said property, as hereinbefore defined, shall be paid by said surviving trustees to said Jeanne G. Hill. (Tr. 91.)

Fifth. Upon the death of said Jeanne G. Hill the said trust shall cease and determine and all of said trust property then remaining in the hands of said surviving trustees shall go to and vest absolutely in equal shares in the children of said Jeanne G. Hill. If, at the time of the death of said Jeanne G. Hill, any of her children shall have died leaving issue, such issue shall receive the share of said trust property to which such deceased child would have been entitled if living. If all of the children of said Jeanne G. Hill

should predecease her, then upon her death said trust fund and the whole thereof shall go to and vest in John Gallois, if living, and if he be then dead, then it shall vest in the next of kin of said Jeanne G. Hill, in accordance with the succession laws of the State of California then in effect. In the event of the death of said Jeanne G. Hill prior to the death of said Margaret P. Gallois, said trust fund shall cease and determine upon the death of said Margaret P. Gallois, and said trust fund and the whole thereof shall go to and vest in the children of Jeanne G. Hill and their issue, as hereinbefore provided. If said Jeanne G. Hill and all her children die without issue prior to the death of said Margaret P. Gallois, then this trust shall terminate and the trust funds shall vest in said Margaret P. Gallois. (Tr. 92.)

Ninth. Whereas said Margaret P. Gallois heretofore laid out and expended for the account and benefit of John Gallois the sum of $251,000.00, or thereabouts, exclusive of interest, and this agreement is made in part for the purpose of insuring to Jeanne G. Hill and her children a benefit which may to some extent correct the discrepancy between the moneys received by said Jeanne G. Hill from said Margaret P. Gallois and the outlays of said Margaret P. Gallois on behalf of said John Gallois. (Tr. 92.)

Now, therefore, notwithstanding anything which may be hereinbefore contained, it is provided that at the time of the death of said Margaret P. Gallois, if there has been paid to her by John Gallois or on his account sums of money sufficient so that the said Mar-

garet P. Gallois shall have been reimbursed to such extent that the amount unpaid is less than the value of the assets in the annexed schedule, exclusive of any claim against John Gallois, as appraised at the time of her death, then fifty per cent (50%) of the excess of the value of said property over and above the amount of such outlays remaining unpaid shall go to and vest in said John Gallois and the balance of said property shall vest as hereinbefore provided. If, at the time of the death of said Margaret P. Gallois, the amount of such unpaid outlays made by her on behalf of John Gallois still exceeds the then value of the trust fund in the hands of said trustees, exclusive of any claim against John Gallois, the whole of said fund shall go to and vest in the children of Jeanne G. Hill, after her death as hereinbefore provided, but said John Gallois shall not at any time be deemed indebted to said trustee or to the estate of Margaret P. Gallois, nor shall any attempt be made by the trustees or any successors of Margaret P. Gallois to collect any part of said outlays from said John Gallois, and if the same shall at the death of Margaret P. Gallois apparently exist as an indebtedness, such indebtedness shall be deemed forgiven and cancelled, together with any instruments, documents, or writings of any kind constituting evidence of any such indebtedness, so that the same cannot go to or vest in any successor of Margaret P. Gallois under the terms of this instrument or otherwise. (Tr. 93.)

At the time the trust was created, the decedent was 68 years of age and in good health for a woman of

that age. She had 2 children, John aged 38, and Jeanne aged 36, and 3 grandchildren of the ages of 7, 5, and 1, respectively, all being the children of Jeanne. She left surviving her at her death 2 children, 3 grandchildren and 3 great grandchildren, Harry Poett III, aged 1 year and 8 months, Carolan Poett, aged 5 months, and Louise Haley, aged 5 months. (Tr. 94.)

The decedent's son was unaware of the trust at the time of its creation and did not learn of its existence until about 2 years later. (Tr. 94.)

Decedent's daughter, Jeanne, was married to Horace Hill, Jr., who had been well off, but who, in the period from 1924 to 1928, was in very straitened circumstances. It was to protect her daughter from further loss that the decedent had created the trust. The trust had an indebtedness greater than the market value of the property in the trust and John was constantly being pressed by Hill and others to pay the amount he owed his mother. He was unable to make any payments on his indebtedness until 1927. Between December 19, 1927, and September 13, 1928, he made payments aggregating about $42,000.00. (Tr. 94.)

By October, 1928, John was financially able to pay the balance of the money he had borrowed from his mother. At that time he and the decedent agreed orally that he would pay back the sums he had borrowed upon condition that he was made a trustee and that the corpus of the trust would not be invaded

again. She agreed to these conditions and John then executed his promissory note, dated October 30, 1928, in the sum of $251,000.00, to the trustees. (Tr. 94.)

Following this, and on November 7, 1928, two of the original trustees, Emile Pissis and William H. Cook, resigned, and John E. Gallois and Jeanne G. Hill were appointed trustees in their place. Following his appointment as trustee, John paid the balance of his indebtedness. (Tr. 95.)

By December, 1927, the statute of limitations had run on John Gallois' indebtedness to the decedent and he was under no legal obligation to pay any part thereof; furthermore, prior to the payments by him, the trust properties had no value since they were encumbered to an extent in excess of their fair market value. (Tr. 96.)

The case arose because the Commissioner of Internal Revenue of the United States claimed a deficiency of Estate Tax against the Estate of Margaret P. Gallois in the amount of $19,323.36. The case regularly came up for hearing before the Tax Court of the United States in San Francisco, California, on September 22, 1944. Upon the 27th day of February, 1945, said Tax Court of the United States made its findings of fact and opinion and rendered its decision in favor of the respondent for the full amount of the alleged deficiency. (Estate of Margaret P. Gallois, 4 T. C. 840, Tr. 101.) The Tax Court of the United States included the entire trust estate in the gross estate of Margaret P. Gallois, under Section 811(c)

of the Internal Revenue Code, following the case of *Blunt v. Kelly,* 131 Fed. (2d) 632, on the grounds that the trust instrument provided that the trustees were authorized and directed to apply to the maintenance and support of the decedent any part of the trust corpus, which, at any time, might be necessary, in their opinion, for maintenance and support, because of any deficiency in the trust income. (4 T. C. 485; Tr. 100.)

The Tax Court of the United States found the facts, as follows, "By October, 1928, John was financially able to pay the balance of the money he had borrowed from his mother. At the time he and the decedent agreed orally that he would pay back the sums he had borrowed upon the condition that he was made a trustee and that the corpus of the trust would not be invaded again. She agreed to those conditions and John then executed a promissory note dated October 30, 1928, in the sum of $251,000.00 to the trustees." (4 T. C. 843; Tr. 94.)

The Tax Court of the United States in its decision found as follows: "By December, 1927, the statute of limitations had run on John Gallois' indebtedness to the decedent and he was under no legal obligation to pay any part thereof; furthermore, prior to the payments by him, the trust properties had no value since they were encumbered to an extent in excess of their fair market value. Therefore, conclude the petitioners, the payment by John Gallois, which he was not legally obligated to make, and which gave value to the trust

properties, constituted the payment of a full and adequate consideration for a one-half interest in the trust, and brings the case within the exception provided in section 811(c). We are not impressed with this contention." (4 T. C. 844; Tr. 96, 97.)

The United States Circuit Court of Appeals for the Ninth Circuit in deciding the case on appeal based its decision entirely upon the remote possibility of reverter and did not discuss petitioners' contention that the payment of $251,000.00 by John Gallois for his interest in the trust was a full and adequate consideration for a one-half interest in the trust under the exception provided in Section 811(c) of the Internal Revenue Code. It held the entire trust corpus to be includible in the estate under Section 811(c) of the Internal Revenue Code only because the provisions of the Fifth clause of the trust instrument provided: "If said Jeanne G. Hill and all of her children die without issue prior to the death of the said Margaret P. Gallois, then this trust shall terminate and the trust funds shall vest in said Margaret P. Gallois."

The Court found, as follows:

> "Before the trustor died she had eight direct descendants—John, who by the required payment had brought himself within Article Ninth, and Jeanne and Jeanne's three children and three grandchildren. The petitioners point out the extreme unlikelihood that the creator's descendants all would predecease her in such a way that the trust's beneficial interests would disappear.

"However, retention of a possibility of reverter by the trustor renders the trust estate taxable, and the imminence or remoteness of the likelihood of the revesting contingency's occurrence is not a matter for our consideration. As is said in an analogous context in Fidelity Co. v. Rothensies, 324 U. S. 108, 111, 'It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed such speculation is irrelevant to the measurement of estate tax liability.'

"The decision of the Tax Court is affirmed."

(Tr. 124.)

JURISDICTIONAL STATEMENT.

The United States Circuit Court of Appeals for the Ninth Circuit filed and entered its judgment affirming the decision of the Tax Court of the United States on November 16, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. A. 347.) The United States Circuit Court of Appeals for the Ninth Circuit has, in this case, decided an important question of Federal Law which had not been, but should be, settled by this Court. (Supreme Court Rule 38 (5) (b).) The case involves a proper interpretation of Sections 811(c) and (i) of the Internal Revenue Code.

QUESTIONS PRESENTED.

I.

Did the payment by John Gallois of $42,000.00 to Margaret P. Gallois, the decedent, and $209,000.00 into the trust, under an agreement between the decedent, Margaret P. Gallois, and John Gallois, that John Gallois would pay back the sum of $251,000.00 on an obligation barred by the statute of limitations on the condition that he be made a trustee and that the corpus of the trust would not be invaded, constitute a consideration within the exception provided for in Sections 811(c) and (i) of the Internal Revenue Code, so that no part of the trust estate was subject to estate tax in the Estate of Margaret P. Gallois?

II.

Did the payment by John E. Gallois of $251,000.00 on an obligation barred by the statute of limitations bring the trust, which at the time of decedent's death had a market value of $139,374.25, within the exception provided for in Sections 811(c) and (i) of the Internal Revenue Code, as to that one-half of the trust received by John Gallois under Section Ninth of the trust instrument?

III.

Does the doctrine of the case of *Fidelity-Philadelphia Trust Co. v. Rothensies,* 324 U. S. 108, require the inclusion in the estate of decedent of the one-half interest in the trust estate acquired by Jeanne G. Hill

under Article Fifth of the trust instrument, where, at the time of the death of the trustor, she had eight direct descendants, ranging in ages from five months to fifty-four years of age?

IV.

Does the doctrine of the case of *Fidelity-Philadelphia Trust Co. v. Rothensies,* 324 U. S. 108, require the inclusion in the trust estate of decedent of that one-half of the trust estate under Section Ninth of the trust instrument which went to John Gallois, despite the fact that John Gallois had paid $251,000.00 which he was not legally obligated to pay in order to obtain a one-half interest in a trust which was indebted for more than the market value of its assets, and the trust instrument did not contain any provision for a reverter to the decedent as to the one-half interest acquired by John Gallois?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

(1) This Court has never decided the question as to whether or not a remote possibility of reverter by operation of law brings the principal of a trust into the gross estate of a decedent grantor under the provisions of 811(c) of the Internal Revenue Code, where an adequate consideration was paid in money for the right to receive the trust estate upon the death of the grantor who had preserved the right to the income for life.

(2) The decision of the questions raised in this case are desirable in order to remove the confusion in the administration of the revenue laws.

(3) The United States Circuit Court of Appeals for the Ninth Circuit did not consider or discuss the petitioners' contention that the payment of $251,000.00 by John E. Gallois, in order that he might receive a one-half interest in the trust on the death of the decedent grantor, constituted a purchase of his interest and comes within the exception excluding that one-half interest from the gross estate of decedent under the provisions of 811(c) and (i) of the Internal Revenue Code.

(4) The decision of said Circuit Court of Appeals, as to the one-half interest in the trust passing to John Gallois, is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit, holding that a remote possibility of reverter by operation of law does not bring the trust corpus within the estate of grantor decedent, in the case of *Commissioner of Internal Revenue v. Irving Trust Co.,* 147 Fed. (2d) 946.

(5) The decision of said Circuit Court of Appeals in the Gallois case is also in conflict with the following cases:

Estate of John H. Eckhardt, 5 T. C. 673;
Estate of Harris Fahnestock, 4 T. C. 1096;
Commissioner of Internal Revenue v. Estate of Frank Hall, 1946 Prentice-Hall Federal Tax Service, Page 72,319. (Counsel regrets that

the official citation on this case is not available on the West Coast, as it was decided by the Second Circuit on January 17, 1946, being No. 113);

Lloyd's Estate et al. v. Commissioner of Internal Revenue, 141 F. (2d) 758, Third Circuit.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Ninth Circuit, demanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and the decision of the United States Circuit Court of Appeals for the Ninth Circuit be reviewed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, San Francisco, California,
February 8, 1946.

CLYDE C. SHERWOOD,
JOHN V. LEWIS,
JEROME POLITZER,
Counsel for Petitioner.

(Appendix Follows.)

Appendix

United States Code Annotated—Title 28—*Judicial Code and Judiciary.* No. 347.

(Judicial Code, Section 240, amended.) Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal. (As amended by Act of February 13, 1925, Chapter 229, 43 Statutes 936.)

Internal Revenue Code.

Sec. 811. Gross Estate (as amended by No. 402, 403, 404, 1942 Act; No. 501, 1943 Act.)

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or

intangible, wherever situated, except real property situated outside of the United States—

* * * * * * *

(c) Transfers in Contemplation of, or Taking Effect at Death.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * * * * *

(i) Transfers for Insufficient Consideration.—If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subsections (c),

(d), and (f) is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 835

JOHN E. GALLOIS, EXECUTOR AND JEANNE G. HILL, EXECUTRIX OF THE ESTATE OF MARGARET P. GALLOIS, DECEASED, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 89–101) is reported at 4 T. C. 840. The opinion of the Circuit Court of Appeals (R. 120–124) is reported at 152 F. 2d 81.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 16, 1945. (R. 125.) The petition for a writ of certiorari was filed on

February 11, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 811 (c) of the Internal Revenue Code requires the value of the trust corpus to be included in the gross estate of the grantor.

2. Whether there was a "bona fide sale for an adequate and full consideration in money or money's worth", under Section 811 (c), so as to exclude the trust from the grantor's gross estate.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust

or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * * *

(26 U. S. C., Sec. 811.)

STATEMENT

The findings of the Tax Court, so far as pertinent here, are as follows:

The decedent, Margaret P. Gallois, died testate on August 8, 1940, a resident of San Francisco, California. The petitioners, John E. Gallois and Jeanne G. Hill, are executor and executrix, respectively, of her last will and testament. Prior to August, 1924, the decedent had loaned $251,000 to her son, John E. Gallois, with no evidence of

the indebtedness being executed in writing. In order to make this loan she had heavily encumbered her own property. Because she had advanced to her son such a large part of "his portion of the estate", the decedent desired to protect the interest of her other child, Jeanne G. Hill, and accordingly, on August 9, 1924, executed the trust involved herein. (R. 90.)

The trustees were directed to apply the income of the trust, (a) to the payment of interest due or to become due on the obligations of the decedent, secured by liens on the trust property; (b) to the payment of taxes, assessments, insurance, repairs, etc.; and (c) after payment of the above charges, to pay the remainder of the net income to the decedent. (R. 90.) The trustees were also directed to pay any portion of the principal to the grantor which in their opinion might be necessary for her maintenance and support if the income were insufficient. (R. 91.) Upon the death of the grantor, the income was to be paid to her daughter Jeanne for life. (R. 91.) Paragraph "Fifth" made provision for the ultimate distribution of corpus at Jeanne's death, but if Jeanne and all her children should die without issue prior to the grantor's death, the trust was to terminate and the corpus revested in the grantor. (R. 91–92.) Paragraph "Ninth" set forth conditions under which the grantor's son John might share in the corpus after the grantor's death, such condi-

tions being predicated upon John's repayment of the money owed to his mother. (R. 92–93.)

The decedent retained no power to alter, amend or revoke the trust. (R. 93.)

At the time the trust was created, the decedent was 68 years of age and in good health for a woman of that age. She was survived by her two children (Jeanne and John), three grandchildren and three great grandchildren. (R. 93–94.)

The decedent's son was unaware of the trust at the time of its creation and did not learn of its existence until about two years later. (R. 94.)

The husband of the decedent's daughter had been well off, but in the period from 1924 to 1928 he was in very straitened circumstances. It was to protect her daughter from further loss that the decedent had created the trust. The trust had an indebtedness greater than the market value of the property in the trust and decedent's son was constantly being pressed by her son-in-law and others to pay the amount he owed her. He was unable to make any payments on his indebtedness until 1927, but between December 19, 1927, and September 13, 1928, he made payments aggregating about $42,000. (R. 94.)

By October, 1928, decedent's son was financially able to pay the balance of the money he had borrowed from his mother. At that time he and the decedent agreed orally that he would pay back the sums he had borrowed upon condition that he was

made a trustee and that the corpus of the trust would not be invaded again. She agreed to these conditions and her son then executed his promissory note, dated October 30, 1928, in the sum of $251,000, to the trustees. (R. 94.)

On November 7, 1928, two of the original trustees resigned, and decedent's son and daughter were appointed trustees in their place. Following his appointment as trustee, decedent's son paid the balance of his indebtedness. (R. 94–95.)

On June 19, 1942, a California court entered a "Decree Terminating Life Estate, etc." in which it was adjudged that by reason of the death of the decedent an undivided one-half interest in the real and personal property which constituted the trust property vested in her son and the interest of the trust in one-half of the trust estate was terminated. (R. 95.)

The Tax Court held that the entire value of the trust corpus was includible in the gross estate and so found that there is a deficiency in estate tax in the amount of $19,323.36. (R. 101.) Its decision was affirmed by the Circuit Court of Appeals. (R. 125.)

ARGUMENT

1. Under the terms of the trust, the decedent was not only entitled to receive the trust income for life but also to have the principal invaded if necessary for her support. The trust agreement also provided that, if the decedent's daughter

and the latter's children died without issue prior to the death of the decedent, the trust was to terminate and the trust fund was to revest in the decedent. (R. 71, 92.) Because of these rights the decedent had an interest in the trust corpus; and all of the remainder interests, including that of the decedent's son, were contingent. The contingency was not of course removed until the decedent's death, for it could not be known until that time that the beneficiaries of the remainder interests would receive anything from the trust. Indeed it could not be known that the trust would even be in existence until her death. Consequently this case comes squarely within the provisions of Section 811 (c) of the Internal Revenue Code, *supra,* providing for the inclusion of any interest of which the decedent has made a transfer in trust which was intended to take effect in possession or enjoyment at or after her death. *Helvering* v. *Hallock,* 309 U. S. 106. Thus the courts below correctly held that the entire corpus of the trust must be included in the gross estate under that section.

The decision below is supported by *Fidelity Co.* v. *Rothensies,* 324 U. S. 108, and *Commissioner* v. *Estate of Field,* 324 U. S. 113, where this Court held that the entire trust estate in each case was includible in the gross estate. There are no material distinctions in the facts here. In *Fidelity Co.* v. *Rothensies* the decedent had created a trust

to pay the income to herself during her life and at her death to her two daughters during their respective lives. At the death of each daughter the corpus supporting her share of the income was to be paid to her descendants. If both daughters died without leaving surviving descendants, the corpus was to be paid to such persons as the settlor might appoint by will.

The facts are also similar in the *Field* case in that the trust created by the decedent not only reserved the income to him for life but also gave him the right to get back the corpus if he should survive his two nieces. He did not survive them and it was held that the full value of the trust property was includible in his gross estate.

In the *Fidelity Co.* case, this Court announced the rule that the taxable gross estate "must include those property interests the ultimate possession or enjoyment of which is held in suspense until the moment of the grantor's death or thereafter," 324 U. S. at 111. In this connection the Court also pointed out that it makes no difference how remote or uncertain a decedent's reversionary interest may be inasmuch as the decisive factor is whether the possibility of reacquiring the property continues until the decedent's death. To the same effect see *Goldstone* v. *United States*, 325 U. S. 687.

Notwithstanding the above decisions of this Court, petitioners seek to bring the instant case

within the distinctions made in *Commissioner* v. *Irving Trust Co.*, 147 F. 2d 946 (C. C. A. 2d), and *Commissioner* v. *Hall* (C. C. A. 2d), decided January 17, 1946 (C. C. H. Inheritance, Estate and Gift Tax Service, par. 10,253). In the first of these cases, the trustee was authorized to pay over such portion of the trust funds to the grantor (decedent) as the former wished to transfer but payment was absolutely within the discretion of the trustee, and the grantor could collect nothing as a matter of right. Thus the court stated there that since the grantor had reserved no enforcible right and had retained no power or reversionary interest, the situation was distinguishable from that in the *Fidelity* case, *supra*. The *Irving Trust* case does not apply in the Second Circuit where this distinction is absent. *Estate of B. Dominick* v. *Commissioner* (C. C. A. 2d), decided January 2, 1946 (C. C. H. Inheritance, Estate and Gift Tax Service, par. 10,247).

In the *Hall* case the decedent retained the income for life and there was a possibility of reverter by operation of law in the event the decedent survived his own next of kin. The court apparently thought that next of kin was an inexhaustible class (cf. *Engel* v. *Guaranty Trust Co.*, 280 N. Y. 43, 47–48), and held that this did not amount to retention of any right by which the grantor could regain possession or control. In neither the *Hall* nor the *Irving Trust* case was

there a right, as here, to have the principal applied to the maintenance and support of the decedent. Although those decisions may be questionable, there is no reason to believe that the Second Circuit would regard them as controlling here; there is accordingly absent that conflict of decisions between the circuits that requires the intervention of this Court.

2. The petitioners also contend that the portion of the trust estate which passed to the decedent's son comes within the exception in Section 811 (c), permitting exclusion from the gross estate any interest transferred in connection with a "bona fide sale for an adequate and full consideration in money or money's worth." Thus they assert that the decedent's son bought his interest in the trust by paying a debt which he owed to the decedent, the collection of which was barred by the statute of limitations. This payment was allegedly made pursuant to an oral understanding between the decedent and her son that if he would pay the debt she would have him made one of the trustees and would see that thereafter the trustees did not invade the corpus for her maintenance, as they were empowered to do under the trust agreement. (R. 94.) It is apparent, as the Tax Court held (R. 100), that the oral understanding did not refer to, nor in any way concern, the possible invasion of the corpus for the decedent's benefit. It seems clear, too, that no portion of the transfer in trust

was a sale for a consideration, but that the payments constituted the satisfaction of a debt as the Tax Court held. (R. 97.) There is no conflict concerning this question.

CONCLUSION

The decision below is correct and there is no conflict. Accordingly the petition for a writ of certiorari should be denied.

Respectfully submitted,

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